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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
and
CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

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QUESTIONS PRESENTED.

Respondent excepts to the statement of questions presented at page 2 of the petition. Petitioner has stated questions which may have academic interest (but which are neither novel nor unresolved by competent judicial authority); however, they have no connection with "the terms and circumstances of the case" presently before this Court, as required by Rule 40(d)(1). When the terms and circumstances of this case are considered, the three questions which petitioner has attempted to state will be found to be the following, none of which poses an issue for review by this Court on a petition for certiorari:

1. Is a state regulatory commission, in determining a reasonable rate of return, to be applied to a

steam utility's fair value rate base found in accordance with the state statute, compelled by the Fourteenth Amendment to the United States Constitution to accept and follow the testimony of a single expert witness as to reasonable return in conflict with the testimony of other similar witnesses?

2. Is it "unconstitutional" to include, in the rate schedules of a steam utility, a provision, specifically authorized by state statute, providing for the automatic adjustment of steam rates, upward or downward, upon corresponding increases or decreases in the cost of fuel, the utility's principal item of expense?

3. Is a question of due process presented when a state regulatory commission puts into effect an increase in steam rates, otherwise lawful, effective with respect to usage shown by meter readings on and after the date of the order, where no evidence was submitted as to the effect thereof on petitioner and where the state court determined that the question was not properly before it?

STATEMENT OF THE CASE.

Respondent, The Cleveland Electric Illuminating Company (the Company), is engaged in the sale of steam heating service in a portion of downtown Cleveland, serving approximately 600 customers (R. 28).* The steam heating business is operated as a department of the Company, the main business of which is the supply of electric energy in northeastern Ohio, and is not separately financed or capitalized (R. 481-82). This proceeding arises out of an application for an increase in rates filed by the Company with The Public Utilities Commission of Ohio on April 27, 1961. In accordance with the applicable Ohio statutes, respondent filed certain exhibits with its application, the matter was referred to the Commission's staff for review, and the staff rendered a report on the matters involved (Petition, Appendix A, p. 18).

Respondent's application was opposed only by the City of Cleveland, the petitioner herein, which is one of the Company's steam customers. No other customer objected or testified and the rates approved by the state Commission were agreed to by its customers other than petitioner (Petition, Appendix A, p. 20). Hearings before the Commission consumed twenty-five hearing days, most of which were devoted to extensive cross-examination of the Company's inventory and valuation witnesses by the peti-

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* Record references are to the transcript of the record before The Public Utilities Commission of Ohio. Pages 687-701, 742-748, 977-978, 1260-1266, 2249-2258 and 2448-2454 may be found in the Portion of Record Supplied by Appellant, accompanying the Brief of the City of Cleveland, Petitioner herein, before the Supreme Court of Ohio. Pages 34-41, 48-49, 63-65, 68-71, 465-469 673-718, and 740-750 may be found in the Appendix to the Answer Brief of Intervening Appellee before the Supreme Court of Ohio.

tioner (the record before the Commission contains approximately 2,600 pages, excluding exhibits).

The uncontradicted testimony demonstrated that the steam business suffers severe competition from other fuels. For small heating loads, respondent's central station steam cannot compete and in spite of the growth of downtown Cleveland, the number of respondent's customers has been in constant decline since 1950 (R. 37). Because of this competitive factor, respondent's application did not seek to achieve the rate of return to which respondent would otherwise be entitled (R. 36). Respondent's witnesses testified that the proper rates of return were 6.5% (R. 475) or not less than 6.66% (R. 517), respectively, on its fair value rate base. The order of the Commission allowed 3.53% (Petition, Appendix A, p. 34).

After the close of the hearings, the Company filed an amended application reducing the rates requested to a level agreed upon between the Company and its customers other than petitioner, who refused to consent (Petition, Appendix A, p. 20). The Commission found that the increase requested in the amended application would result in a rate of return of 3.53% on respondent's fair value rate base (which the Commission found to be $19,261,306) and held that such a return was not unjust or unreasonable (Petition, Appendix A, p. 34). In opposing the application, the City had presented a witness who testified, in effect, that a rate of return of 2.7% was more than enough (R. 2451). This was based on an alleged fair return on an imputed capitalization. The Commission chose not to follow this testimony, on the ground that the supporting data used by the witness was "too narrow to serve as a criterion" (Petition, Appendix A, p. 30). The Supreme Court of Ohio held that the argument of petitioner in this respect conflicted with the requirements of

the applicable Ohio statutes (Petition, Appendix B, pp. 37-38).

Respondent's steam rates have, since at least 1920, included a fuel adjustment clause which results in an increase or decrease in steam bills based on increases or decreases in the cost of coal, a principal expense item (R. 743). For some years the effect of this clause, as it then existed, was to reduce steam rates to respondent's customers, including petitioner, somewhat more than the actual savings realized by respondent through lower coal prices (R. 685). Petitioner objected to the overcompensating feature of this clause (as well as to the clause in any form), and, as a result, respondent, with the approval of the Commission, amended its fuel adjustment clause to eliminate its overcompensating feature (Petition, Appendix A, p. 31). The Commission found that the inclusion of such a clause in the Company's tariffs was reasonable (Petition, Appendix A, p. 35). Such a clause is specifically authorized by statute. Ohio Revised Code § 4905.31 (B).

Having granted a rate increase, the Commission then authorized respondent to apply the new rates to bills based upon meter readings (which are read throughout the month but only once a month for each customer (R. 706)) made after a date certain. This obviated any need for allocations of consumption and thus facilitated the billings. This plainly does not involve retroactivity, but rather a reasonable discrimination. There is no evidence in the record as to when the meters of any particular steam customer were read and, in particular, no evidence as to when petitioner's meter was read.

The City of Cleveland, petitioner herein, thereupon appealed directly to the Supreme Court of Ohio, in accordance with Ohio Revised Code § 4909.13. This respondent,

by leave of court, intervened as a party-appellee in such court. The Supreme Court affirmed the Commission's order. The City then filed this petition for certiorari.

ARGUMENT.

I. NO FEDERAL QUESTIONS ARE PRESENTED ON THE FACE OF THE PETITION.

Petitioner asserts that no statutory provisions are involved in this proceeding. We understand this to mean, as the Supreme Court of Ohio held (and, in fact, as petitioner conceded before that Court), that the order of The Public Utilities Commission of Ohio was in full conformity with the Ohio regulatory statutes and that no contention is made that these statutes are unconstitutional. Petitioner's position in this respect is difficult to reconcile with that portion of the petition which is, nonetheless, an open attack on the Ohio regulatory statutes. However, in view of petitioner's statement and the decisions of this Court which make it plain that the United States Constitution neither requires nor condemns any particular mode of public utility rate making (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591 (1944)), we assume that the nub of petitioner's contention is that the three actions by the Commission complained of are unconstitutional *on the facts of this case*. A brief examination of those facts shows that the only disputes here are questions of evidence and regulatory judgment. There are no federal questions in this case.

Petitioner's contention that, since the Constitution protects regulated utilities from confiscation of their property by low rates, the consumer has the constitutional right to require not only that the legislature (or the administrative agency to which power is delegated) regulate,

but that it regulate in a particular way, is interesting, but has no relationship to this case. As petitioner's own argument shows, it merely is objecting to the Commission's refusal to follow the opinion of one of its witnesses as to the "maximum fair earnings permissible" (Petition, Appendix A, p. 30). The Supreme Court of Ohio held that the finding of the Commission was in accord with the Ohio statutes (Petition, Appendix B, pp. 37-38). Petitioner's claim that inclusion of a purchased fuel adjustment clause in a utility's rate schedules is an unconstitutional delegation of legislative power is contrary to all decisions on this point (although there are, of course, varying views as to the reasonableness of such clauses in particular cases). In any event, since such a clause is expressly authorized by an Ohio statute (Ohio Revised Code § 4505.31(B)) and petitioner has expressly disclaimed the involvement of any statute here, no federal issue remains. Finally, petitioner's claim of "retroactive" rate-making, as petitioner's argument reveals, is merely an objection to the method by which the Commission put this rate increase into effect and, in addition, as the Supreme Court of Ohio held (Petition, Appendix B, p. 39), is an issue not properly raised at all in this proceeding. None of this presents "a federal question of substance."

II. ASSUMING ARGUENDO THAT RATEPAYERS ARE CONSTITUTIONALLY ENTITLED TO REQUIRE REGULATION AND TO REQUIRE IT AT A PARTICULAR LEVEL OF RETURN OR OF RATES, THE ONLY QUESTION PRESENTED BY THIS CASE IS WHETHER THE PUBLIC UTILITIES COMMISSION OF OHIO WAS OBLIGED AS A MATTER OF FEDERAL LAW TO ACCEPT WITNESS HONAKER'S OPINION IN RESPECT TO THE ALLOWABLE RETURN.

A. Petitioner's Only Contention, When Its Constitutional Theory Is Viewed on the Terms and Circumstances of This Case, Is That the Commission Should Have Adopted the Opinion Testimony of One of Its Expert Witnesses.

Petitioner asserts that public utility ratepayers are protected, under the Federal Constitution, against confiscation of their property through unlawfully high public utility rates. This theory has been rejected by every court to which it has been presented, including this Court. See *Hollis v. Kutz*, 255 U. S. 452 (1921), and cases collected at 12 A. L. R. 404. However, for the purposes of this petition, it is sufficient to point out that even if petitioner correctly states the law as an abstract principle, the only evidence to which it points as demonstrating that there has *in fact* been an unconstitutional confiscation of property in *this* case is the opinion testimony of a single witness, which testimony was in conflict with that of two other witnesses. Thus, unless this Court chooses to hold that a public utility ratepayer always presents a federal question of substance when he claims that rates allowed by a state commission are too high, the only question presented by petitioner is whether the Ohio Commission had to follow this particular witness' opinion as to the allowable return. It is submitted that this question, one of the weight of the evidence before

a regulatory commission, is simply not a federal question of substance.

Petitioner asserts (Petition, p. 5) that it introduced "the only evidence in this case as to what would be a confiscatory rate." Actually the testimony which it quotes is the witness' opinion as to the "maximum allowable dollar return" (R. 2451), which works out to approximately 2.7% on the rate base found by the Commission. There was, of course, other rate of return testimony, all of which is discussed in the Commission's opinion which is copied in Appendix A to the Petition (at p. 30).

Petitioner is not before this Court in any representative capacity but solely in its individual capacity as one of respondent's customers. The Company's other customers consented to the allowed increase in rates (Petition, Appendix A, p. 20). There is no evidence of petitioner's consumption, billings under the old or new rates, ability or inability to obtain other heating services or the relative costs of other heating methods, or any other data relevant to the question whether there is in fact a confiscation of its property. Petitioner relies solely on the quoted opinion evidence. This Court long ago held that a party could not rely solely on evidence of this type when it could have provided accurate data to support its constitutional claim. See *The Minnesota Rate Cases*, 230 U. S. 352, 465-66 (1913), where the Court said:

> "We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation * * *."

See also *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, 169 (1934).

Moreover, this Court has held that a commission is not constitutionally bound to accept any particular opinion evidence on any point. See, for example, *Market Street Railway Co. v. Railroad Commission of California*, 324 U. S. 548, 560 (1945). There were, as usual, divergent opinions on rate of return in evidence in this case (compare R. 475, 517 and 2451). The Commission could lawfully give such weight as it deemed proper to these opinions and it did not violate the Fourteenth Amendment because it chose to follow one and not another. This Court stated the rule clearly in *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290 (1934), another appeal from a decision by the Ohio Commission in a rate case, when in speaking of the opinions of expert witnesses it said (292 U. S. 290, 299):

> "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury * * * or to a judge * * * or to a statutory board." [Citations omitted.]

B. By Its Own Terms Petitioner's Constitutional Theory Is Inapplicable Here Since It Is Grounded on the Existence of a Monopoly and No Monopoly Is Presented in This Case.

Petitioner does not contend that respondent's customers are required by law to take respondent's steam service but argues that they are required to do so by practical considerations. "Practical" compulsion, even if it exists, is not constitutionally identical with legal coer-

cion. See, for example, *Hollis v. Kutz, supra.* On the undisputed evidence, however, there is no such "practical" compulsion to take this respondent's steam service.

Petitioner says that respondent "has a monopoly on the sale of steam heating service in downtown Cleveland" (Petition, p. 3). It implies that this service is one of the "necessities of life" (Petition, p. 11). Respondent earnestly wishes that this were so. Unfortunately it is not. Respondent has no legal monopoly in the supply of central station steam service. It has no practical monopoly in the supply of heating service. The record contains considerable testimony, all uncontradicted, as to the competitive aspects of the steam heating business and the effects of that competition upon the Company.

Competition for heating purposes is primarily from gas (R. 36, 808). For small heating loads, gas has proved so much more attractive to customers than central station steam service that "central station steam simply cannot compete" (R. 36-37). The result has been a continued loss of customers by the Company's steam department (R. 37, see also R. 63, 812). Competition arises also from use of oil burners (R. 64). Similar competitive problems have been presented in respect to use of the Company's steam service for air conditioning purposes (R. 759). Because of the extremely competitive nature of the heating business, the Company cannot earn the rate of return to which it is entitled (R. 467). For this reason the Company agreed to rates which would yield a rate of return substantially lower (indeed, almost 50% lower, see Commission Order, Petition, Appendix A, p. 30) than the rate of return to which it would be entitled if it could earn it (R. 36). In so doing, the Company reduced its request, made in its initial application, from rates which would yield a return

of 4.0%, itself far less than a lawful return (R. 52), to rates yielding 3.53% (Petition, Appendix A, p. 31).

We do not believe that any constitutional right exists in the public to require the regulation of the sale price of any commodity. This is a legislative question. However, on the uncontroverted record the factual assumption which underlies the City's specious constitutional argument simply does not exist in this case. This case does not involve a utility service which must be taken by a customer, practically speaking. Central station steam service is not a "necessity of life." This Company's steam customers can use other means to accomplish the same ends and many have done so.

III. A DETERMINATION BY THE OHIO COMMISSION THAT THE USE OF A CLAUSE PROVIDING FOR BILLING ADJUSTMENTS UPON STATED CHANGES IN FUEL COSTS IS REASONABLE PRESENTS NO FEDERAL CONSTITUTIONAL QUESTION.

Petitioner asserts that the Ohio Commission has given respondent "the unrestrained power to adjust its rates in accordance with a coal escalation formula" (Petition, p. 15). But nothing is "unrestrained" which must be accomplished "in accordance with a * * * formula."

Respondent has had a fuel adjustment clause in its steam rate schedules for at least 45 years (R. 743). Prior to the order of the Ohio Commission herein involved, the existing clause, when triggered by the requisite increase or decrease in coal costs, reflected in rates somewhat more than the resultant savings or increase in costs (R. 683). This differential served to account for changes in other coal-related costs (R. 693) and to compensate for the lag necessarily created by the Company's billing procedures (R. 677) and the step effect of the clause itself (R. 701).

As the result of a more or less regular decline in coal costs, the effect in recent years has been to pass on to respondent's customers greater savings than the Company actually realized through the reduction in its expenses (R. 685), and respondent's customers other than petitioner wished the clause retained in the same form (R. 685). The coal clause was, however, amended at respondent's request to eliminate the possibility that, in the event of an increase in coal cost, the Company would receive more than the actual increase in cost or, correspondingly, that, upon coal cost decreases, the Company's customers would enjoy a greater benefit than the actual amount of the decrease.

Since most of petitioner's arguments go to the previous clause, they are irrelevant. It should be noted, in passing, that the assertion that the Ohio Commission does not supervise the clause is simply untrue; respondent renders monthly reports to the Commission on fuel clause adjustments. Petitioner's sole point, apparently, is that use of an escalation clause of any sort is an unconstitutional delegation by the Commission of its powers to the utility. Petitioner has stated that no statutory provisions are involved in this case. It is apparent, therefore, that this issue is disposed of by Ohio Revised Code § 4905.31 (B), which specifically provides for escalation clauses in rate schedules:

> "Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement with another public utility or with its customers, consumers, or employees providing for:
>
> * * * * *
>
> "(B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement;"

Even in the absence of statute, clauses of this type have been utilized in many jurisdictions, see *Re Laclede Gas Company*, 46 P. U. R. 3d 277 (Mo. P. S. C. 1962), and serve a useful purpose. As the court said in *City of Norfolk v. Virginia Electric & Power Co.*, 197 Va. 505, 90 S. E. 2d 140 (1955), in holding a purchased gas adjustment clause proper and "highly remedial" (197 Va. 505, 516, 90 S. E. 2d 140, 148):

> "The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money."

The delegation of power would seem to be a state question in any event. The question whether this sort of clause is an unlawful delegation of power by the administrative agency was discussed in *City of Chicago v. Illinois Commerce Commission*, 13 Ill. 2d 607, 150 N. E. 2d 776 (1958), also involving a purchased gas adjustment clause, where the court followed the *Virginia Electric & Power Co.* case, *supra*, saying (13 Ill. 2d 607, 618-19, 150 N. E. 2d 776, 782):

> "We cannot find that the public or consumer has lost, nor the Commission abandoned, any rights or powers by the authorization of the automatic adjustment clause. * * * Since there has been neither loss of substantial rights to the consuming public, nor abandonment of the administrative function, we find no abuse of discretion by the Commission in this pragmatic adjustment."

See also *State ex rel. Hotel Continental v. Burton*, 334 S. W. 2d 75 (Mo., 1960); *City of El Dorado v. Arkansas Public Service Commission*, 235 Ark. 812, 362 S. W. 2d 680 (1962); *United Gas Corp. v. Mississippi Public Service Commission*, 240 Miss. 405, 127 S. 2d 404 (1961). These cases uniformly point out that the end result of the inclusion of fuel costs such as these in the rate schedule is equitable protection of both the ratepayer and the utility, guaranteeing each a fair charge without the repeated necessity of applications to the regulatory commission for relief, with attendant delays and expense. Insofar as supervision is concerned the Ohio Commission has, and has always had, power to investigate, either on its own motion or on complaint, any possible abuse if and when it should arise (Ohio Revised Code § 4905.31) and has, when necessary, exercised this power. See, for example, *Cooper Tire & Rubber Co. v. Central Ohio Light & Power Co.*, 10 P. U. R. 3d 430 (P. U. C. O., 1955). While there may be disagreement as to the form of the clause or its advisability in a particular case, it is obvious that such clauses are not per se unlawful.

IV. THIS COURT SHOULD NOT BE REQUIRED TO REVIEW A REGULATORY COMMISSION'S DECISION AS TO THE MOST EFFICIENT METHOD OF MAKING A RATE INCREASE EFFECTIVE.

Petitioner speaks dramatically of a discriminatory and retroactive rate increase. As petitioner itself concedes, it is merely complaining of the mechanical method by which respondent's steam rate increase was put into effect. All the Commission actually did was permit respondent to put the rate into effect with respect to usage reflected by meter readings after a specific date, rather than by usage after a specific date.

This has long been the practice in Ohio. For example, this petitioner made precisely the same argument in rate litigation reported as *City of Cleveland v. Public Utilities Commission of Ohio*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940). The same technique was followed by the Ohio Commission, subsequent to its decision in this case, in a gas rate proceeding in which this petitioner was an active party, *Re East Ohio Gas Company*, P. U. C. O. Proceeding No. 30,311 (1964), *and petitioner did not object.*

The reasons for using this method are simply mechanical, as petitioner says, but that does not make them any the less persuasive. If the same rates are applied to all of the consumption involved in a particular bill the computation is simple, being no different, arithmetically, from any other billing. To divide periods of use between successive rate schedules on any other basis would involve costly allocations. And, since respondent's steam service is not monitored on a minute-to-minute basis, such apportionments would necessarily be judgments and would give rise to disputes which could never be resolved to the satisfaction of every individual ratepayer. Every customer would be a potential litigant, not in respect to the rate increase, but on the apportionment of his bill after that increase was found reasonable.

This question, therefore, presents merely a dispute over a matter subject to the judgment of the regulatory commission. And, although petitioner admits this when it says that some other method could have been devised (Petition, p. 9), petitioner offered no evidence at all on this. The question, therefore, like the other questions posed by petitioner, is purely an abstract one.

More important, this question was determined by the Supreme Court of Ohio entirely on procedural grounds and thus is not ripe for determination by this Court. The

complete discussion of the point by the Supreme Court of Ohio is as follows (3 Ohio St. 2d 82, 85, 209 N. E. 2d 424, 426):

> "For its fourth proposition appellant asserts that the rates set by the commission were applied retroactively, since they were ordered by the commission to become effective on the first billing date subsequent to the filing of such adjusted tariff schedules, and the company by its billings charged customers at the increased rates from the date on which the adjusted tariff schedules were filed.
>
> "This matter of the date on which the rate increase was first charged to the customer is a matter between the customer and the company *which will not be considered by this court in this appeal* from an application of the company to the Public Utilities Commission for an increase in its rates and charges." (Emphasis supplied.)

This Court will not concern itself with hypothetical federal questions when their actual decision in a case turns upon a separate and independent state ground, including a procedural ground. *McQuade v. Trenton,* 172 U. S. 636, 639 (1899), where this Court said:

> "The right of the defendant to damages was, however, assumed in the opinion of the Vice Chancellor, who disposed of the answer by saying that the defendant had mistaken his remedy, and must resort to another proceeding against the city for his damages. This was beyond all doubt a ruling broad enough to support the decree regardless of any Federal question that possibly might have been raised from the allegation of the answer. * * * [I]t is quite evident that a Federal question was not necessarily involved in the case, and hence that this court has no jurisdiction."

This principle applies even where a state court discusses a federal issue, if its judgment rests on adequate state grounds. *Black v. Cutter Laboratories*, 351 U. S. 292, 298 (1956). In this case, of course, the Supreme Court of Ohio expressly held that this question cannot be raised in this appeal from a rate proceeding before the Public Utilities Commission of Ohio.

The Supreme Court of Ohio held that this question "is a matter between the customer and the company" (3 Ohio St. 2d 82, 85, 209 N. E. 2d 424, 426). Obviously, it is a matter which can and should be raised only by *affected* customers. Since respondent's other customers consented to the rate increase here involved (Petition, Appendix A, p. 20), petitioner speaks only for itself and there is no evidence whatsoever that *petitioner's* own steam bill was in any way affected by the method in which this rate increase was put into effect.

This is not a question of retroactivity at all, but rather of discrimination with respect to individual customers and whether the discrimination is reasonable under the circumstances. The record does not show how any particular customer was affected. It does show that each customer was probably affected differently.

CONCLUSION.

None of the theoretical issues urged by petitioner actually involve the facts of this case. The so-called "confiscation" question is merely an assertion that the Ohio Commission should have adopted the opinion of one expert witness on rate of return instead of another's. The so-called "delegation of powers" question, unless it is an attempt to hold an Ohio statute unconstitutional (which petitioner expressly disavows), merely challenges the

reasonableness of the inclusion of a fuel cost clause in respondent's rate schedule. The so-called "retroactivity" question was not properly presented to the Supreme Court of Ohio and hence is not properly before this Court. And on none of these points is there any showing of actual prejudice to petitioner. As this Court said in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues."

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